

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RICHARD NICHOLSON,

Petitioner,

v.

RENEE BAKER, *et al.*,

Respondents.

Case No. 3:16-cv-00486-MMD-CSD

ORDER

I. SUMMARY

In this habeas matter, Respondents filed a motion to dismiss (ECF No. 72) that is before the Court. Petitioner Richard Nicholson opposed (ECF No. 74) and Respondents have replied (ECF No. 76). Also before the Court is Nicholson's motion for evidentiary hearing (ECF No. 75). For the reasons discussed below, Respondents' motion is granted in part and denied in part, and Nicholson's motion is denied.

II. BACKGROUND

Nicholson challenges a 2010 conviction and sentence imposed by the Eighth Judicial District Court for Clark County. In June 2006, police officers responded to a family disturbance call and Nicholson was charged with striking his ex-girlfriend and her teenage daughter with a baseball bat. (ECF Nos. 3, 41-2.) Within weeks, Nicholson's appointed counsel requested a competency determination. (ECF No. 11-5.) Although Nicholson was found competent, trial counsel continued to question his competency as the case moved forward. (ECF Nos. 11-9 at 28, 12-14, 12-17, 39-1, 39-2.) On February 5, 2007, Nicholson pleaded not guilty. (ECF No. 11-17.)

Following a two-day trial, a jury returned a guilty verdict in May 2009. (ECF No. 12-24.) Trial counsel revisited the issue of Nicholson's competency in July 2009. (ECF

No. 11-9 at 37.) New counsel was appointed the following month, and she also doubted Nicholson's competency. (ECF Nos. 11-9 at 38, 13-5.) Doctors reported some decomposition in new evaluations. (ECF No. 39-3.) Thus, in June 2010, the state court committed Nicholson to receive treatment. (ECF No. 13-7.) Three months later, he completed treatment and was found competent to complete his case. (ECF No. 13-13.)

Sentencing went forward, and the state court entered a judgment of conviction on November 10, 2010, giving Nicholson an aggregate sentence of 17 to 50 years in prison.¹ Nicholson appealed. On September 29, 2011, the Nevada Supreme Court affirmed Nicholson's conviction on direct appeal. (ECF No. 14-8.)

Nicholson filed a *pro se* state petition for writ of habeas corpus ("state petition") on January 26, 2012, seeking post-conviction relief. (ECF No. 14-13.) Counsel was later appointed, and Nicholson filed a counseled supplemental petition. (ECF No. 14-19.) The state court held an evidentiary hearing and denied the state petition. (ECF Nos. 16-14, 16-28.) Nicholson appealed. The Nevada Court of Appeals affirmed the state court's denial of relief. (ECF No. 18-27.) A remittitur issued on November 4, 2015. (ECF No. 18-

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Count	Charge	Sentence
Count 1	Burglary while in possession of a deadly weapon	48-120 months
Count 2	Battery constituting domestic violence with use of a deadly weapon resulting in substantial bodily harm	60-180 months, concurrent with Count 1
Count 3	Battery constituting domestic violence with use of a deadly weapon resulting in substantial bodily harm	60-180 months, consecutive to Count 2
Count 4	Child abuse and neglect with substantial bodily harm	60-180 months, consecutive to Count 3
Count 5	Child abuse and neglect	24-60 months, consecutive to Count 3
Count 6	Child abuse and neglect	24-60 months, concurrent with Count 5

(ECF Nos. 13-17, 13-18.)

1 28.)

2 Nicholson mailed the original federal petition initiating this case on August 8, 2016.
3 (ECF No. 5 at 1 (“original petition”).) The Court later appointed counsel and granted
4 Nicholson leave to amend the petition. (ECF No. 25.) He filed a counseled first amended
5 petition for writ of habeas corpus (ECF No. 38 (“amended petition”)) on March 5, 2019,
6 alleging four grounds for relief.

7 Respondents moved to dismiss certain claims as untimely and/or unexhausted.
8 (ECF No. 45.) The Court granted Respondents’ motion to dismiss in part finding Ground
9 I of the amended petition untimely and Ground IV unexhausted, but deferred Nicholson’s
10 actual innocence claim until he addressed the mixed nature of the amended petition, and
11 this case thereafter is postured for merits review. (ECF No. 55.) Nicholson filed a motion
12 for stay and abeyance to return to state court and the Court granted his motion. (ECF
13 Nos. 56, 58.)

14 In September 2019, Nicholson returned to state court, filing a counseled
15 successive state petition for writ of habeas corpus alleging one claim for relief. (ECF No.
16 65-4.) His single claim for relief alleged that trial counsel rendered ineffective assistance
17 for failure to investigate and present defenses and mitigation based on Nicholson’s mental
18 health and mental health state in violation of his Sixth and Fourteenth Amendment rights.
19 (*Id.* at 20.) The state court denied his second state habeas petition as time-barred under
20 NRS § 34.726(1), successive under NRS § 34.810(2), and further held that Nicholson
21 failed to present a colorable claim of actual innocence. (ECF No. 65-14.)

22 Nicholson appealed. On appeal, he alleged that (1) he was insane at the time of
23 the crime and, therefore, demonstrated actual innocence; (2) that trial counsel was
24 ineffective for failing to investigate and present defenses and mitigation based on his
25 mental health and mental state, in violation of his Sixth and Fourteenth Amendment rights;
26 and (3) the state appellate court should remand for an evidentiary hearing. (ECF No. 65-

22.) The Nevada Court of Appeals affirmed that his second state habeas petition was untimely and successive. (ECF No. 65-35.)

The Court reopened this case in February 2021 upon Nicholson's request. (ECF Nos. 59, 60.) Nicholson filed a second amended petition and Respondents filed a motion to dismiss. (ECF Nos. 61, 64.) The parties entered a stipulation to allow Nicholson to file a third amended petition to clarify Ground 1. (ECF No. 69.) In December 2021, Nicholson filed his third amended petition. (ECF No. 71.) Respondents now seek to dismiss Ground I as untimely, Ground III as unexhausted, and Ground IV as procedurally barred. (ECF No. 72.)

III. DISCUSSION

A. NICHOLSON HAS NOT ESTABLISHED ACTUAL INNOCENCE

A convincing showing of actual innocence may enable habeas petitioners to overcome a procedural bar to consideration of the merits of their constitutional claims. *See Schlup v. Delo*, 513 U.S. 298, 314-16 (1995). "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar [or] expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (citation omitted). "[I]f a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup*, 513 U.S. at 316. However, the Supreme Court has cautioned that "tenable actual-innocence gateway pleas are rare. *See McQuiggin*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329); *House v. Bell*, 547 U.S. 518, 538 (2006) (emphasizing that the *Schlup* standard is "demanding" and seldom met).

To demonstrate actual innocence, "a petitioner must show that, in light of all the evidence, including evidence not introduced at trial, 'it is more likely than not that no

1 reasonable juror would have found [him] guilty beyond a reasonable doubt.” *Majoy v.*
2 *Roe*, 296 F.3d 770, 776 (9th Cir. 2002) (quoting *Schlup*, 513 U.S. at 316). Put another
3 way, “actual innocence” is established when, in light of all the evidence, “it is more likely
4 than not that no reasonable juror would have convicted [the petitioner].” *Bousley v. United*
5 *States*, 523 U.S. 614, 623 (1998) (quoting *Schlup*, 513 U.S. at 327-28). The petitioner
6 must establish factual innocence of the crime, and not mere legal insufficiency. See
7 *id.*; *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003). To demonstrate actual
8 innocence to overcome a procedural bar under *McQuiggin* and *Schlup*, a petitioner must
9 present “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy
10 eyewitness accounts, or critical physical evidence—that was not presented at
11 trial.” *Schlup*, 513 U.S. at 324.

12 Nicholson argues that his demonstration of actual innocence overcomes
13 procedural defects including the timeliness of Ground I, in addition to Respondents’
14 arguments regarding the exhaustion of Ground III and procedural default of Ground IV.²
15 (ECF No. 74 at 5.) He asserts that due to his diagnosed schizophrenia and other mental
16 illnesses that he was “probably insane at the time of the purported offenses, and thus
17 probably innocent.” (*Id.* at 14.) He contends that the new items of evidence, including
18 Nicholson’s competency evaluations and Clark County Detention Center (“CCDC”)
19 medical and psychological records noting that Nicholson reported “auditory hallucinations
20 command type to kill self and others,” demonstrate that he was insane and could not form
21 the requisite intent. (ECF Nos. 41-1 at 66-67, 74 at 12-15.)

22 Under Nevada law, criminal defendants are presumed to be legally sane, and, to
23 prevail with an insanity defense, must overcome that presumption with a preponderance

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25 ²In its April 7, 2020, order granting in part Respondents’ motion to dismiss, the
26 Court deferred consideration of Nicholson’s actual innocence claim until he addressed
27 “the mixed nature of the Amended Petition and this case thereafter is postured for merits
28 review.” (ECF No. 55 at 5.) The Court, however, finds that there is an adequate record to
address Nicholson’s actual innocence claim herein.

1 of the evidence. See *Williams v. State*, 885 P.2d 536, 538 (Nev. 1994). Nevada
2 recognizes the defense of legal insanity and applies the *M’Naghten* rule. See, e.g., *Miller*
3 *v. State*, 911 P.2d 1183, 1185 (Nev. 1996). Under the *M’Naghten* rule, the jury determines
4 whether the defendant “knew the nature and quality of [his] acts, had the capacity to
5 determine right from wrong or whether [he] was doing wrong when [he] committed the
6 crime.” See *Clark v. State*, 588 P.2d 1027, 1029 (Nev. 1979). “To qualify as being legally
7 insane, a defendant must be in a delusional state such that he cannot know or understand
8 the nature and capacity of his act, or his delusion must be such that he cannot appreciate
9 the wrongfulness of his act, that is, that the act is not authorized by
10 law.” *Finger v. State*, 27 P.3d 66, 84-85 (Nev. 2001). “The fact that a person had mental
11 health problems did not necessarily mean that he or she could meet the *M’Naghten* test
12 for insanity.” *Id.* at 72.

13 1. EVIDENCE AT TRIAL

14 At trial, the State called Nicholson’s ex-girlfriend, Lula Jack, to testify and she
15 testified that she dated Nicholson in 2005. (ECF No. 12-21 at 35.) Nicholson and his ex-
16 girlfriend moved in together and lived with Jack’s three daughters. (*Id.*) The relationship
17 broke down and Nicholson moved out of the house. (*Id.* at 36.) About four or five days
18 after Nicholson moved out, Nicholson returned to the house to retrieve his belongings,
19 which Jack had put in the garage for him to pick up. (*Id.*)

20 Jack further testified that Nicholson began to bang on a window because a
21 package was missing from his belongings. (*Id.* at 37-38.) After hearing a shattering noise
22 from the back sliding glass door, Jack and her 16-year-old daughter ran upstairs. (*Id.* at
23 38.) Jack’s other two daughters, who were 13 and seven-years-old, were already upstairs.
24 (*Id.*) Jack and her daughter ran into her master bedroom and locked the door behind
25 them. (*Id.* at 39.) Jack testified that Nicholson kicked in the bedroom door and began to
26 hit her face. (*Id.*) Jack’s daughter grabbed an aluminum bat that Jack left in her bedroom,

1 hit Nicholson with the bat, and her and Nicholson began to fight over the bat. (*Id.* at 40.)
2 Jack's daughter ran downstairs. (*Id.*)

3 Jack testified that she also ran downstairs and observed Nicholson striking her
4 daughter with the bat. (*Id.* at 41.) Jack laid on top of her daughter to shield her from being
5 hit with the bat and Nicholson continued to strike both of them with the bat. (*Id.* at 41.)
6 While being struck, Jack observed her two other daughters standing on the stairs and
7 instructed them to call the police. (*Id.*) Jack testified that Nicholson told her younger
8 daughters not to call the police or they were "going to get the same thing." (*Id.*)

9 The State called Jack's daughter to testify about the event, the phone call she
10 placed to 911, and her injuries. (ECF No. 12-22 at 10-16.) The State also presented
11 testimony from two treating physicians as to Jack's injuries. (ECF No. 12-21 at 49.)

12 The State called Officer Sabino to testify at trial. (ECF No. 12-22 at 4.) Officer
13 Sabino testified that he was dispatched to the scene and was informed that the suspect
14 may still be present. (*Id.*) Officer Sabino approached the house on foot. (*Id.* at 5.) Officer
15 Sabino observed the garage door opening and Nicholson walked out of the garage
16 holding an aluminum baseball bat. (*Id.*) Officer Sabino described Nicholson as 6'7" tall,
17 270 lbs., and that he appeared obviously angry from his actions and demeanor. (*Id.*)
18 Officer Sabino instructed Nicholson to drop the bat, put his hands in the air, and lay on
19 the ground. (*Id.*) Nicholson complied and dropped the bat. (*Id.*) Nicholson turned away
20 from Officer Sabino, dropped on his knees, but did not lay further on his stomach. (*Id.*)
21 Officer Sabino placed his foot in the middle of Nicholson's back to push him to the ground
22 to put him in custody. (*Id.* at 6.)

23 At trial, counsel for Nicholson argued that that there was insufficient evidence to
24 convict Nicholson and that he was acting in self-defense. (*Id.* at 29-31.) Trial counsel
25 highlighted that at the preliminary hearing, Jack's daughter testified that she picked up
26 the bat and hit Nicholson on the forehead when he was coming around a corner and
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1 presented photographic evidence of the welt on his forehead. (*Id.* at 30.) Trial counsel
2 further highlighted that Jack's daughter was kicking Nicholson in the groin when they were
3 both downstairs. (*Id.*) Trial counsel argued that Nicholson did not take any action towards
4 the two younger daughters and that there was inconsistent testimony as to whether the
5 two younger daughters were in the room to observe the event. (*Id.*)

6 **2. NEWLY PRESENTED EVIDENCE**

7 In July 2006, Nicholson's trial counsel requested a competency evaluation. (ECF
8 No. 11-5 at 3.) Nicholson's CCDC medical records indicate "suicide attempt x2." (ECF
9 No. 41-1 at 82.) On July 30, 2006, Nicholson reported occasional auditory hallucinations
10 and under the delusions category, the medical professional indicated a question mark as
11 to the presence of paranoid delusions. (*Id.* at 83.) Further, the July 30, 2006, record
12 appears to indicate a diagnosis of schizophrenia. (*Id.*) The state court referred to reports
13 by Dr. Harder and Dr. Chambers finding Nicholson capable of understanding the nature
14 of the charges against him and that he had the ability to assist counsel in his defense.
15 (ECF No. 11-9 at 2.)

16 In August 2007, Nicholson failed to appear for calendar call and subsequently was
17 arrested on a bench warrant. (ECF No. 12-14 at 3.) In October 2008, Dr. Harder evaluated
18 Nicholson at the request of his trial counsel. (*Id.* at 9.) Dr. Harder found Nicholson
19 competent to stand trial. (*Id.* at 10.) During the evaluation, Nicholson "admitted to hearing
20 voices in his head in the past, but denied suicidal ideation." (*Id.* at 11.) Dr. Harder
21 concluded that Nicholson was "borderline competent to stand trial" and that he
22 understood "his charges and the facts of the case." (*Id.*) Nicholson, however, "has a
23 history of psychosis, has been to Lakes Crossing before, and states rather emphatically
24 that [he] has videotape evidence proving his innocence, that the feds and the attorney
25 general are investigating his case because of the bogus charges, and seemed rather
26 grandiose that he was going to win his case without question and that everything would
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1 be revealed in court to clear his name.” (*Id.*) Dr. Harder further commented that he was
2 unaware if Nicholson had any evidence or witnesses as he claimed, “so it is questionable
3 if [Nicholson] is delusional or not.” (*Id.*) Due to “some possibilities that [Nicholson] is
4 delusional,” Dr. Harder found that a second opinion was warranted. (*Id.* at 12.)

5 In October 2008, Nicholson consented to the administration of medication,
6 Risperdal, to which Nicholson asserts is an antipsychotic medication that treats
7 schizophrenia and bipolar disorder. (ECF Nos. 41-1 at 78, 71 at 28.)

8 On December 2, 2008, at calendar call, trial counsel informed the state court that
9 defense was not ready to proceed because Nicholson has not provided a list of witnesses.
10 (ECF No. 39-2 at 3.) Trial counsel further provided that Dr. Harder found Nicholson “a
11 borderline candidate for competency” and that if Nicholson does not have a defense,
12 “maybe he is delusional.” (*Id.* at 5-6.) Upon questioning from the court, Nicholson
13 responded that he has over 36 witnesses for his case. (*Id.* at 7.)

14 On December 11, 2008, CCDC medical records indicate Nicholson experienced
15 auditory hallucinations. (ECF No. 41-1 at 91.) On January 30, 2009, the record indicates
16 that Nicholson denied hallucinations and continued to refuse medications. (*Id.* at 71.)

17 In February 2009, trial counsel filed a motion to suspend proceedings pending a
18 determination as to Nicholson’s competency to stand trial. (ECF No. 12-14.) Trial counsel
19 attached Dr. Harder’s evaluation and represented that Nicholson was being housed in the
20 psychiatric ward of CCDC. (*Id.* at 3, 9-12.) Trial counsel further argued that he pressed
21 Nicholson for a list of witnesses and other evidence and has not received any of the
22 requested information. (*Id.* at 4.)

23 In February 2009, CCDC medical records indicate that Nicholson presented poor
24 eye contact and reported “auditory hallucinations command type to kill self and others,”
25 in addition to poor sleep “due to voices.” (ECF No. 41-1 at 67.) On February 19, 2009, a
26 report indicates that Nicholson covered his door with his mattress. (*Id.* at 63.) When asked
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1 to take down his mattress, Nicholson threw feces on the door. (*Id.*) Nicholson sat on his
2 bunk and when his name was called, Nicholson covered his face and was mute, did not
3 make eye contact, and was nonresponsive. (*Id.*)

4 Dr. Harder evaluated Nicholson on March 2, 2009, finding “schizophrenia,
5 undifferentiated chronic.” (ECF No. 41-2 at 4.) Dr. Mortillaro also evaluated Nicholson on
6 March 7, 2009, finding schizophrenia, depression, and anti-social personality traits. (*Id.*)
7 Nicholson, however, was competent to stand trial and trial commenced in May 2009.
8 (ECF Nos. 12-17 at 3, 12-21.) During jury selection, Nicholson interrupted the court. (ECF
9 Nos. 12-21 at 8, 71 at 33-4.) A potential juror asked if Nicholson was mentally challenged.
10 (*Id.*)

11 In May 2010, after trial and before sentencing, the state court set another
12 competency hearing. (ECF No. 39-3.) The court noted that Dr. Chambers and Dr.
13 Mortillaro found Nicholson competent in March 2009, “although they did indicate a
14 number of concerning diagnoses, including Axis 1 diagnoses at that time. Those same
15 diagnoses are present this time, but it would appear, pursuant to the reports, there’s been
16 obviously some pre-competency in some regards to Mr. Nicholson’s mental status such
17 they both found him not competent at this time.” (*Id.* at 5.) The state court referred
18 Nicholson to Lakes Crossing. (*Id.*) In September 2010, the state court ruled Nicholson
19 was competent and ordered his transport from Lakes Crossing to CCDC. (ECF Nos. 13-
20 12, 13-13.)

21 Nicholson argues that this evidence shows that Nicholson “probably ‘was laboring
22 under such a defect of reason . . . as to not know the nature and quality of the act he was
23 doing; or if he did know it, that he did not know he was doing what was wrong’ due to his
24 diagnosed schizophrenia and other mental defects.”³ (ECF No. 76 at 15.) The newly

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26 ³Nicholson also argues that if Nevada’s insanity standard is limited to instances of
27 delusion, then Nevada law “unconstitutionally limit[s] the insanity defense below that
28 which the federal constitution requires states to provide.” (ECF No. 74 at 10-12.)

1 presented evidence, however, does not demonstrate that it is more likely than not that no
2 reasonable juror would have found Nicholson guilty beyond a reasonable doubt. This
3 evidence, considered in light of all of the evidence, would not lead a reasonable juror to
4 conclude that Nicholson could not form the intent necessary to commit the crimes of which
5 he was convicted.

6 The newly presented evidence shows that Nicholson reported auditory
7 hallucinations and that he was diagnosed with schizophrenia. (ECF No. 41-1 at 83.) Upon
8 evaluation, Nicholson was nonetheless deemed competent to stand trial in July 2006.
9 (ECF No. 11-9 at 2.) The majority of the evaluations and/or reports documenting
10 Nicholson's mental state, however, occur at least one year after the date of the crime.
11 *See Griffin v. Johnson*, 350 F.3d 956, 965 (9th Cir. 2003) (psychiatric evaluation that was
12 years apart from the crime was of minimally probative value in establishing mental state
13 at time of the crime). In October 2008, upon evaluation, Dr. Harder found that it was
14 "questionable" as to whether Nicholson was delusional. (ECF No. 12-14 at 11.) Upon
15 evaluation in June 2010, Nicholson was determined to be incompetent for the sentencing
16 phase of his trial, and was sent to Lakes Crossing for treatment, whereupon he was
17 determined to have regained his competency after three months of treatment. (ECF
18 Nos. 13-7, 13-13.) Even if the newly presented evidence demonstrates that Nicholson
19 had a mental illness at the time that his evaluations and/or treatment took place, it is clear
20 that "[t]he fact that a person had mental health problems did not necessarily mean that
21 he or she could meet the *M'Naghten* test for insanity." *Finger*, 27 P.3d at 72. In short, the

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23 Nicholson cites *Clark v. Arizona*, 548 U.S. 735 (2006), and *Kahler v. Kansas*, 140 S. Ct.
24 1021, in support of his argument. (*Id.* at 10-11.) The United States Supreme Court,
25 however, explained in *Clark* that there is no particular standard for insanity required as a
26 matter of federal due process. See 548 U.S. at 748-49 ("the insanity rule, like the
27 conceptualization of criminal offense, is substantially open to state choice"). Further, the
28 Court confirmed that states are allowed to use different definitions of insanity in *Kahler*,
holding that due process did not require Kansas to adopt a particular insanity test, used
in some other jurisdictions, that turned on a defendant's ability to recognize that his crime
was morally wrong. See 140 S. Ct. at 1027.

1 newly presented evidence does not convincingly undermine the State's case such that it
2 is more likely than not that no reasonable juror would have convicted Nicholson.

3 Moreover, there was evidence at trial that undermined the contention that the
4 crimes were a product of insanity. Nicholson went to Jack's residence to pick up his
5 belongings and Jack testified that Nicholson became "belligerent" when he was unable to
6 locate a package. (ECF No. 12-21 at 38.) Nicholson struck Jack and chased her daughter
7 downstairs when her daughter hit him with an aluminum bat. (*Id.* at 40.) Nicholson
8 instructed Jack's younger two daughters not to call the police when Jack told them to do
9 so. (*Id.* at 41.) Officer Sabino testified that he observed Nicholson leaving the house with
10 a satchel and holding an aluminum bat. (ECF No. 12-22 at 5.) Nicholson complied with
11 Officer Sabino's instructions to drop the bat upon his arrest. (*Id.*)

12 The Court finds that Nicholson has not established a convincing showing of actual
13 innocence to overcome the procedural default or statute of limitation bars of his claims.

14 **B. GROUND I**

15 As the Court explained in its earlier order, Ground I is subject to dismissal as
16 untimely because it does not relate back to ground 1(b) of Nicholson's original petition
17 that was timely filed. (ECF No. 55 at 5.) The Court found that original ground 1(b) is based
18 on the alleged errors in the jury instructions on reasonable doubt and/or elements of child
19 abuse and neglect offenses and trial counsel's performance in relation to the jury
20 instructions, whereas amended Ground I is based on alleged insufficiency of the evidence
21 presented at trial. (*Id.*) Although the claims share a common fact, the Court found that the
22 operative facts and the Court's examination are markedly different. (*Id.*) Nicholson argues
23 that actual innocence overcomes any procedural defects including the timeliness of
24 Ground I. (ECF No. 74 at 5.) Because the Court found that Nicholson has not established
25 a convincing showing of actual innocence, Ground I is dismissed as untimely.

1 **C. GROUND III**

2 In Ground III, Nicholson alleges that his trial counsel rendered ineffective
3 assistance for failing to object to an unconstitutional reasonable doubt instruction. (ECF
4 No. 71 at 21-25.) Nicholson asserts that Ground III is technically exhausted and that this
5 claim would be denied on state procedural grounds if he returned to state court to present
6 it. (*Id.* at 21.) Respondents argue that because Nicholson returned to state court and
7 failed to set forth his claim presented in Ground III in his second state habeas petition, his
8 claim remains unexhausted and must be dismissed. (ECF No. 72 at 11.)

9 In his opposition, Nicholson asserts that, due to an oversight, he failed to include
10 Ground III in his second state habeas petition. (ECF No. 74 at 17-18.) He argues that
11 nonetheless Ground III is exhausted because had he included it in his second state
12 habeas petition, it would have been treated as defaulted as untimely and successive. (*Id.*
13 at 18.) Nicholson further argues that Respondents waived the argument that Ground III
14 is procedurally defaulted because they did not raise it as an affirmative defense in their
15 motion to dismiss. (*Id.* at 19.)

16 A federal court need not dismiss a claim on exhaustion grounds if it is clear that
17 the state court would find the claim procedurally barred. *See Castille v. Peoples*, 489 U.S.
18 346, 351 (1989); *see also Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (en banc)
19 (“An unexhausted claim will be procedurally defaulted, if state procedural rules would now
20 bar the petitioner from bringing the claim in state court.”). A claim may be considered
21 procedurally defaulted if “it is clear that the state court would hold the claim procedurally
22 barred.” *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002). Where a petitioner has
23 “procedurally defaulted” a claim, federal review is barred unless he “can demonstrate
24 cause for the default and actual prejudice as a result of the alleged violation of federal
25 law.” *Coleman v. Thompson*, 501 U.S. 722, 750.

26 “Generally, post-conviction counsel’s ineffectiveness does not qualify as cause to
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1 excuse a procedural default.” *Ramirez v. Ryan*, 937 F.3d 1230, 1241 (9th Cir. 2019) (citing
2 *Coleman*, 501 U.S. at 754-55). However, in *Martinez v. Ryan*, the Supreme Court created
3 a narrow exception to the general rule that errors of post-conviction counsel cannot
4 provide cause for a procedural default. See 566 U.S. 1, 16-17 (2012). “Under *Martinez*,
5 the procedural default of a substantial claim of ineffective assistance of trial counsel is
6 excused, if state law requires that all claims be brought in the initial collateral review
7 proceeding . . . and if in that proceeding there was no counsel or counsel was ineffective.”
8 *Ramirez*, 937 F.3d at 1241 (citing *Martinez*, 566 U.S. at 17). Nevada law requires
9 prisoners to raise ineffective assistance of counsel claims for the first time in a state
10 petition seeking post-conviction review, which is the initial collateral review proceeding
11 for the purposes of applying the *Martinez* rule. See *Rodney v. Filson*, 916 F.3d 1254,
12 1259-60 (9th Cir. 2019).

13 Here, it is clear that Nicholson would face multiple procedural bars if he were to
14 return to state court with his unexhausted claim. See, e.g., NRS §§ 34.726, 34.810.
15 However, Nevada procedural bars can be excused with a showing of cause and prejudice
16 or a fundamental miscarriage of justice (i.e., actual innocence), which are substantially
17 the same as the federal standards. If a petitioner has a potentially viable cause-and-
18 prejudice or actual-innocence argument under the substantially similar federal and state
19 standards, then the petitioner cannot firmly establish that “the state court would hold the
20 claim procedurally barred.” *Sandgate*, 314 F.3d at 376. A different situation is presented,
21 however, where the Nevada courts do not recognize a potential basis to overcome the
22 procedural default arising from the violation of a state procedural rule.

23 Accordingly, a Nevada habeas petitioner who can rely upon *Martinez*, and only
24 *Martinez*, as a basis for overcoming a state procedural bar on an unexhausted claim can
25 successfully argue that the state courts would hold the claim procedurally barred but that
26 she nonetheless has a potentially viable cause-and-prejudice argument under federal law
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1 that would not be recognized by the state courts when applying the state procedural bars.

2 In the present case, Nicholson has invoked *Martinez* to overcome a procedural
3 default of the unexhausted ineffective assistance of trial counsel claim in Ground III. As
4 the state courts have already denied Nicholson's actual innocence argument, it appears
5 that Nicholson has no other potentially viable bases for demonstrating cause and
6 prejudice that might be recognized by the state courts and that thus would preclude a
7 finding of technical exhaustion by procedural default as to the unexhausted claim. (ECF
8 Nos. 65-14, 65-35 at 3-5.)

9 The Court will defer an analysis of cause and prejudice under *Martinez* of Ground
10 III until after the filing of an answer and reply that address both cause and prejudice and
11 the claims on the merits. The Court may then have the benefit of its analysis of a full
12 factual and legal presentation as to all relevant claims.⁴ Accordingly, Respondents'
13 motion is denied without prejudice as to Ground III. Respondents may renew their
14 procedural default arguments in their answer.

15 **D. GROUND IV**

16 In Ground IV, Nicholson alleges that trial counsel rendered ineffective assistance
17 for failing to investigate and present defenses and mitigation based on Nicholson's mental
18 health and mental state. (ECF No. 71 at 25-39.) Respondents argue that Ground IV must
19 be dismissed as procedurally barred because the Nevada Court of Appeals affirmed the
20 state district court's ruling that Nicholson's second state habeas petition was untimely and

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22 ⁴The Court notes that the action taken herein is premised upon Nicholson having
23 a potentially viable cause and prejudice argument based upon *Martinez*, and only
24 *Martinez*, as opposed to having also potentially viable cause and prejudice arguments
25 based upon grounds that the state courts would recognize. If Nicholson begins arguing
26 any such additional cause and prejudice arguments herein, that immediately will "kick"
27 this case back into a procedural posture where the next step instead is dictated by *Rose*
28 *v. Lundy* and its progeny. That is, the Court's action is taken on the premise that the
unexhausted claims are technically exhausted by procedural default because Nicholson
has no potentially viable cause and prejudice (or actual innocence) arguments that the
state courts would recognize as a basis for overcoming the state procedural bars.

1 successive. (ECF No. 72 at 12.) Nicholson acknowledges that the state court rejected his
2 claim in Ground IV and argues that he can demonstrate good cause and prejudice under
3 *Martinez* to excuse procedural default. (ECF No. 74 at 20-24.) Similar to Ground III, the
4 Court finds that the cause and prejudice analysis of Ground IV is necessarily connected
5 to the merits of the claim itself and will defer a determination on both questions until a
6 merits determination. Respondents' motion as to Ground IV is therefore denied without
7 prejudice on those grounds. Respondents may renew their procedural default arguments
8 in their answer.

9 **IV. MOTION FOR EVIDENTIARY HEARING**

10 Nicholson moves for an evidentiary hearing on his gateway claim of actual
11 innocence, and, in the alternative, whether he can overcome procedural default under
12 *Martinez* (ECF No. 75). Evidentiary hearings are authorized in federal habeas corpus
13 actions by Rule 8 of the Rules Governing § 2254 Cases. However,
14 an evidentiary hearing is not required if the issues can be resolved by reference to the
15 state court record. *See Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) ("It is
16 axiomatic that when issues can be resolved with reference to the state court record,
17 an evidentiary hearing becomes nothing more than a futile exercise"); *see also Schriro v.*
18 *Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual
19 allegations or otherwise precludes habeas relief, a district court is not required to hold
20 an evidentiary hearing"). Nicholson does not show that factual development by
21 an evidentiary hearing is warranted. The Court resolves Nicholson's argument
22 of actual innocence on the briefing of the parties and on the extensive record before the
23 Court without need for further factual development.

24 With regard to the question of whether any of Nicholson's claims are barred by the
25 procedural default doctrine, as explained above, the Court will not address those issues
26 until the parties have filed their answer and reply, and the merits of all of Nicholson's
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1 remaining claims have been briefed. Therefore, Nicholson's request for an evidentiary
2 hearing concerning issues related to excusing procedural default under *Martinez* will be
3 denied without prejudice.

4 **V. CONCLUSION**

5 It is therefore ordered that Respondents' Motion to Dismiss (ECF No. 72) is
6 granted in part and denied in part as follows:

- 7 1. Ground I is dismissed as untimely.
- 8 2. Respondents' request to dismiss Grounds III and IV is denied without
9 prejudice. A decision on whether Nicholson can demonstrate cause and
10 prejudice under *Martinez* as to Grounds III and IV is deferred until the time
11 of merits review. Respondents may reassert the procedural default
12 arguments with respect to those claims in their answer.

13 It is further ordered that Nicholson's Motion for Evidentiary Hearing (ECF No. 75)
14 is denied.

15 It is further ordered that within 30 days of entry of this order, Respondents must
16 file an answer addressing all remaining claims in the third amended petition for writ of
17 habeas corpus and also addressing whether Grounds III and IV are barred by procedural
18 default under federal law.

19 It is further ordered that Nicholson will have 30 days from service of the answer
20 within which to file a reply.

21 DATED THIS 23rd Day of May 2022.

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24 MIRANDA M. DU
25 CHIEF UNITED STATES DISTRICT JUDGE
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